Supreme Court, U. S.
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No. 75-182

In the Supreme Court of the United States

OCTOBER TERM, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO.; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL APPENDIX

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
CHARLES L. REISCHEL,
LUTZ ALEXANDER PRAGER,
Attorneys,

Equal Employment Opportunity Commission,
Washington, D.C. 20506.

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A. 1.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORAL OPINION, SEPTEMBER 5, 1974

Civil No. 74-1083

JERSEY CENTRAL POWER & LIGHT CO., PLAINTIFF,

vs.

LOCAL UNION 327, 749, 1289, 1298, 1303, 1309 and 1314 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET ALS., DEFENDANTS.

Newark, N. J.
September 5, 1974

Hearing on plaintiff's application
for summary judgment

Before: The Honorable VINCENT P. BIUNNO,
U.S.D.J.

ORAL OPINION

THE COURT: It seems rather clear that the kind of issue which this case involves, namely, the taking of conflicting positions by parties with different interests and different functions to perform, is precisely the kind of situation for which the remedy of declaratory judgment was designed.

In some respects it is different from the traditional declaratory judgment suit in that usually one party

takes a given position and the other takes a different position, and the proceeding brings to the Court those two different positions. Here the traditional pattern is somewhat different because the party moving the case, the employer, does not have a specific position. It seeks to resolve differences between other parties who are defendants, and in this respect it resembles to some extent the relationships found in a proceeding for interpleader or in the nature of interpleader, or perhaps the position of a fiduciary seeking instructions when beneficiaries make conflicting claims.

The major problem at this stage is not so much whether the case is suitable for declaratory relief but whether that relief can be provided at this stage of the case through the motion for summary judgment, and that question, of course, also includes the subordinate question whether, if the Court is of the view that final relief cannot be given in all respects at this time, there is any extent to which partial summary judgment might be appropriate.

Basically the Court sees the problem as one of construing two contracts, the collective bargaining agreement on the one hand and the agreement with EEOC on the other.

The history which is not in dispute shows that there was an agreement entered into with EEOC for the establishment and execution of a program to bring up a proportion of various employee groups to higher levels than they were at the time. In the absence of anything to indicate that that contract is illegal or invalid, the Court sees no need or any point

to explore the question whether there was or was not past discrimination prior to the making of the contract, nor to explore, as Watkins had to, the question of Title Seven per se.

Obviously the statute contemplated that its general provisions would be particularized in specific cases through one means or another, and in this case it had been particularized through the vehicle of an agreement.

It is also quite plain that this case could have been without question filed in the Superior Court of New Jersey. It certainly involves a person interested under a written contract, or whose right, status, or other legal relations are affected by statute, and who is enabled by the state legislation to have determined any question of construction arising under that contract or statute, and to obtain a declaration of rights, status or other legal relations thereunder.

Now, if that had been done the Court is told by at least one of the federal representatives that there would have been a removal to this court. The fact that the plaintiff may have foreseen that move should not in any way minimize the remedies which would have been available to the state court and here had it been first filed in the state court and then removed.

Basically the collective bargaining agreement is one that the state court would normally deal with, and it would be governed by state law. In and of itself it carries no federal aspect. The same is not true of the agreement with the EEOC, which is entered into under federal law and by a federal agency.

Nonetheless since jurisdiction would exist here for the major purpose the questions relating to state law would be dealt with in the one and same proceeding as a matter of pendant jurisdiction.

Now, the employer in New Jersey and federally when engaged in interstate commerce is governed by more that one set of standards in the context of this case. The history of provisions dealing with civil rights or anti-discrimination in New Jersey is very old. The provision against the denial of any civil right merely on account of religious principles goes back to July 2, 1776, when it was made a part of New Jersey's first constitution. That prohibition was continued in the 1844 constitution between that time and the adoption of the 1847 constitution. There were at least ten statutes passed in the period between 1884 and 1945 dealing with this subject.

The 1947 constitution broadened the list of forbidden criteria to include not only religious principles but also race, color, ancestry, or national origin. Legislation since then has increased that list to add sex, age, marital status and liability for service in the armed forces.

Now, there is no question that these state laws were on the books at the time when the present collective bargaining agreement was made and prior thereto. The Court must in looking at the contract take the parties to have made their agreement with the intention to comply with those laws. The rule is well established in New Jersey that if a contract is of doubtful meaning and one interpretation would

render it legal and another illegal, the courts will adopt that construction which will not impute to the parties an intention to violate the law.

The parties to a contract are presumed to have made it in view of the existing law and with knowledge thereof. They will not be presumed to have sat down to make an illegal contract.

Now, it is also quite plain from the well-known history of electric utilities in this country generally over many decades that the service has grown and has grown not only in relation to population growth but has grown in relation to utilization per customer. Through improved engineering approaches such as through the economies of scale, through technological improvements and otherwise these operations have been such as to make it possible to contain the growth of the labor cost to a rate not as rapid as that of the public demand for the service, so that over the years—and there are many sources of indisputable accuracy, particularly in the annual publications of the Federal Power Commission on the subject, which will show a steady growth of the work force in this field over the decades.

Now, what has happened in 1974 in terms of a management decision of a need to reduce work force is accordingly somewhat novel, and raises the question of construing the agreement with EEOC, recognizing that at the time it was made the current 1974 conditions may not have been foreseen. This in turn raises the question whether the application of the

provisions of the collective bargaining agreement in respect to layoffs by seniority would bring about a frustration of the purposes of the parties to the EEOC agreement, even though that specific contingency was not dealt with in the formulation of the program.

It appears to the Court that this is the kind of situation like that dealt with in a number of reported decisions involving union locals and international unions, that it may have been what is called an essential implied condition. In New Jersey the lead cases are *International Union* v. *Becherer*, 142 N.J. Equity 561 (Court of Chancery), affirmed 4 N.J. Super. 456 (Appellate Division).

Another one is Edwards v. Leopoldi, 20 N.J. Super 43 (Appellate Division, 1952).

The Court has commentend that it sees no need to take up either now or at later stages of the case, unless other reasons appear to make it necessary, whether there was or was not discrimination in hiring or in other conditions of employment prior to the making of the EEOC agreement. The reason for this should be obvious to anyone familiar with the history of the efforts made under the Civil Rights Act to achieve its purposes. The most constructive of those efforts have been those based on efforts of this kind. In some instances they have been undertaken spontaneously, not only by particular employers but also by groups of employers in an area working through some local community organization or civil organization or other group of that type. The

object has been carried to the point far beyond what any statute on the books requires, such as the setting up of training schools and providing the necessary training where needed to match individuals seeking employment with the openings that are available, and where they lacked the necessary skills.

An affirmative action program with a target some five years later is the kind of thing whose purpose would be utterly frustrated if in a situation of the kind now faced here, the layoffs were to be effectuated solely in accordance with the seniority clause. This does not mean that a seniority clause in and of itself is discriminatory. On the contrary, everything that the Court has been able to find indicates that such clauses are inherently valid. The difficulty is in its application in the context of the affirmative action program which has been developed through the EEOC contract, that it would have a frustrating effect, and even though it might not be discriminatory the act of frustration calls for construction of a seniority clause in the collective bargaining agreement which would make it possible to carry forward the objectives of both agreements to the fullest extent possible. This requires an accommodation of their provisions.

At this stage the Court feels it can go no further than to make that ruling, namely, that to the extent that application of the seniority clause would substantially reduce the relative percentages of those whose hiring is the purpose of the EEOC agreement, it would be in frustration of it, and in violation of

it. The parties to the collective bargaining agreement are also parties to the EEOC agreement, and to the extent that under the current circumstances the provisions of the two are found to be inconsistent the EEOC agreement is to prevail.

Now, that determination is a partial declaratory judgment. There are other questions open which the Court does not feel can be dealt with at this stage, but the determination is to be made by the parties in attempting to devise a formula or a methodology for executing layoffs in a manner consistent with this ruling, and the Court would like guidance from the parties as to further processing, because under the controlling principles an action of this kind may be and probably should be expedited. The Court is under that direction.

This means the parties cannot afford the luxury of extensive and detailed discovery motions up and down the line. The purpose of the declaratory judgment is to resolve controversies as effectively and as expeditiously as possible. In making this ruling the Court does not intend to limit the authority or jurisdiction of any administrative agencies involved, but until such time as they act and take a position, this ruling is intended to control.

Now, are there any views as to how to proceed from here?

MR. COHEN: Your Honor, I do have a question. I would assume that your Honor is going to be answering an interlocutory order of some sort.

THE COURT: That is substantially it. Yes. I see no need for any restraints. I would assume that responsible private parties and government officials would be expected to abide by the ruling. If they do not, of course, there will be time enough for other remedies.

MR. COHEN: What I was going to ask the Court is, in view of the nature of the matter, we would request the Court to permit direct appeal to the Third Circuit. I don't have the title in front of me.

THE COURT: I know. That's all right.

MR. COHEN: 1228.

THE COURT: I would have no difficulty with that request because the Court finds nothing in point on this question.

MR. COHEN: Thank you.

I would then in conjunction with that—and I can represent to the Court that an appeal would be taken forthwith.

THE COURT: I would assume that would be true either way.

MR. COHEN: I would request a stay of the interlocutory order until such time as we can have the matter determined by the Court of Appeals or until such time as the Court of Appeals would determine otherwise. The matter is—the reason is this, your Honor, I assume that whatever affirmative order your Honor would enter, whatever interlocutory order, the company right now is in the process of laying off, so far in accordance with seniority.

THE COURT: I understand.

MR. COHEN: And it is obviously going to be many, many different jobs that will be affected by your Honor's ruling. The exact number we cannot determine. What the superseniority, whatever it be called, for the purposes of your Honor's decision, we cannot yet determine, but there will be an awfully large number of jobs affected.

THE COURT: Right.

MR. COHEN: And without—it's going to obviously have an effect on how the layoffs be continued or whether employees must now be brought back and other employees now laid off.

THE COURT: I think in that regard it would be appropriate to make clear, and this might well be included in the order, that there is certainly no intention that layoffs be effectuated in some precise mathematical fashion at every stage.

I gather that the layoff process involves a series of steps to effectuate it, and the operation of the seniority clause in and of itself requires a certain number of steps or stages in order to find out what effect it is going to have in terms of numbers, so that there may be—there may well be, for example, a selection by the employer of an office or some other unit involving perhaps 25 or 50 people which could be run through this process. It would only be at the end of the whole program of layoffs that the Court intends that the end results be such as to reasonably approximate the percentages that existed at the time that the process began, which is what? July 27?

MR. COHEN: July 27.

THE COURT: And there I think, too, that the parties should realize that the achievement of exact percentages is probably impossible under any system. In the first place employees come in complete units. You can't have 1.45 people. You've either got one or two, so there are going to be distortions for that reason alone, and other unavoidable conditions will undoubtedly result in some variation from theoretically ideal proportions on that basis, and the Court would be inclined to suggest that a deviation either way not greater than 15 per cent of the theoretical ideal would have to be regarded as acceptable by anybody taking a rational attitude on it. That is a pretty good result in any program, but it would be only at the end.

In other words, I don't visualize that anybody laid off now would have to be recalled if the fact be that at the end of the whole process the actual numbers of both groups are approximately at the levels of July 27.

MR. COHEN: Your Honor, it is because of the large degree—the difficulty as a practical matter of dealing with people bumping into these various positions at the point of the layoff that we are requesting the Court, so that we don't have all these interim problems, to stay the effect of the order, your Honor.

THE COURT: I would only stay it long enough for the Court of Appeals to decide on the stay pending the appeal.

MR. COHEN: All right.

And I would assume your Honor will certify the matter to the court.

THE COURT: It is the kind of question that ought to be, unless anybody has a different view. It is quite novel, and I think the parties—everybody is entitled to have good answers.

MR. CONNOR: I don't know that this is directly on that point, but I am inquiring at this time since your Honor's opinion from the bench dealt almost exclusively, if not exclusively, with the Title Seven remedies, whether we are in or out, if you will, speaking for GSA.

THE COURT: I intended to refer to your clients when I said that nothing in the opinion was intended to preclude any of the government agencies from carrying out their normal functions. When, as and if they should take a position, as long as they are parties to the case, the time is ample then to consider then whether the complaint should be supplemented to bring in that element.

MR. CONNOR: You don't intend—

THE COURT: There is no need to restrain your clients or any governmental agency from doing anything that they feel they are obliged to do under this statute.

I also said that I expected that private parties and governmental officials, employees, would probably not need instructions in the period during which the ruling controls and there has not been any action. I would anticipate that no agency would bring compliance complaints or any other sort of needless collateral litigation while this key question is decided. If that should happen then it will be time enough to consider whether or not there should be a restraint, so I don't deal with the question at this stage other than to express that point of view.

MR. CONNOR: Did your Honor intend to indicate that the executive order also requires the relief you are affording?

THE COURT: I do think that the basic theme of the complaint does show a justification for getting a clear answer.

Now, the United States of America is not a favored suitor any more than anybody else in this court, and people who have to deal with the government and have to deal with more than one agency when confronted with problems that they are wholly unable to have resolved without serious risk, are entitled to have the Court take up those issues and give them a clear, simple answer, and bind everybody that might otherwise take conflicting positions.

Now, what that is going to mean at such time as your clients may take some action I can't tell, but I think your clients are proper parties.

MR. CONNOR: We are still in the case?

THE COURT: You are still in.

MR. CONNOR: You are not then at this time making a holding under the executive order?

THE COURT: No. You have not done anything. You have not taken any position. I don't know whether you will or not.

MR. CONNOR: Agreed. Thank you.

THE COURT: Now, what about time schedules? The Court is starting a trial calendar next week, so this is going to involve some juggling in any event, but from the general standpoint what thoughts are there about further processing?

MR. APRUZZESE: Well, if your Honor feels—

When can we finish going through the whole four hundred?

VOICE FROM COURTROOM: It will probably be another three weeks.

THE COURT: I am talking primarily I think in terms of how much time it would take for the parties to develop some approach or some methodology to try to carry out this construction of the contract and distribute it and have some views.

MR. APRUZZESE: Well, if your Honor please, we will immediately go to work on the number of people we have already identified. We have already identified 176. Mr. Hayes says that for the additional people to be laid off the entire bumping process—let me put it this way: The process we will have to use now in layoff to approximate—to either meet or approximate with no less than a deviation of approximately 15 per cent the percentages we had on July 27, I think we will be able to do that with regard to the 176 very quickly. We will get to work on that tomorrow.

As the others develop we will give everyone the information that we have.

I would like to suggest, your Honor, that as soon as we have enough data that we proceed on a two-

track basis, we would immediately notify all the interested parties and try to arrange a meeting, and then report to the Court directly. The reason I say two-track basis, is that perhaps to conserve the time of the Court we would have this information all compiled. We would notify everyone. Hopefully we could meet within 24 or 48 hours, whatever the parties agree upon.

I think that would be in order, and then we could get back to the Court so that as we move along in this process, hopefully, we might be in accord, and the Court would be aware of what we are doing.

THE COURT: All right.

Now, of course, the key item is to try to develop ways to achieve the purposes consistent as much as possible with both agreements. This may mean setting up—I don't know—three seniority lists, one for minorities, one for females, and one for all others, and this will bring you back, I promise you, to the question the Court raised earlier as to where you put the white females and where you put a black female on the seniority list, separate seniority list. They can only go on once. You may have to alternate. I don't know. You will have to work out something.

Yes?

MR. COHEN: What I have doubt as to, what I think the problem is coming down to, the practical side of bumping has been explained.

THE COURT: I know.

MR. COHEN: It is impossible to know in advance where the bumping process takes an employee to. That is why I am not sure. I realize what your Honor is saying and I appreciate what your Honor is saying. I am not sure what type of a system your Honor is suggesting.

THE COURT: I don't know. I don't know as much about it as you do, but I would suggest that you consider some rule such as that if a person is on the list and has seniority over another and the person he would bump is a minority or a female, and those groups are already below by 15 per cent where they should be, then he can't bump, some kind of a rule like that.

You will have to use your ingenuity. You know more about it than I do. You can allow bumping if it doesn't unduly disrupt the percentages we are talking about, and you can't if it does.

Whether through the initial layoff or through the bumping, the net effect is the same.

MR. COHEN: Would this have been implemented before the matter is certified to the Court of Appeals?

THE COURT: Oh, no, not so far as I am concerned.

So far as I am concerned an order can be drawn on the basis of today's ruling, not on the implementation. I think the question that you will want an answer on is today's ruling first.

MR. APRUZZESE: In the interim—

THE COURT: Go ahead and work on what you are doing. Go ahead and report back on what progress you make.

MR. APRUZZESE: And Mr. Cohen, as I understand it, will not only appeal to be heard on the basis of the order but will probably seek a stay.

THE COURT: With the certification I told him I would grant him a stay long enough to apply to the Court of Appeals for a stay. I am not going to pass on that issue beyond giving him an opportunity to apply, but that should not delay the work of trying to set up a system for implementing. The two can run side by side.

MR. APRUZZESE: May I ask the Court what is the Court's feeling with regard to the time that the Court would require when we report back on any progress we are making?

THE COURT: There is no point in my trying to set a time, because we don't know what it is going to involve.

MR. APRUZZESE: It could be a long process. I forgot the information Mr. Hayes and Mr. Laver gave me that to arrive at the original 56 people who were to be laid off on a strict seniority basis the company had to have 386 interviews of all the various people affected, because it is company policy and always has been, and the union expects it, that each employee is told what his rights are, his insurance rights and severance and so on and so forth, and they are given a period of time to bump and so on.

THE COURT: You now have a new element introduced, I suppose, through the vesting provisions of the pension law signed last week.

MR. APRUZZESE: Well, it's going to be like the football draft.

THE COURT: How will that show up on the balance sheet? Has the accountant decided yet?

MR. COHEN: There is one thing. I am not sure whether your Honor has found as a matter of fact —just so I can know when the matter will be going to the Court of Appeals—is your Honor finding that the affirmative action program set forth in the conciliation agreement, which I know I contended to the Court that that is a hiring procedure, which goes over a period of time—

THE COURT: That is the mechanism. Hiring was the mechanism through which a certain goal was to be obtained with an expectation that things would remain the way they were, namely, that the work force each year would be somewhat higher than the year before, and that increase coupled with the turnover would give enough to work with through hiring to bring these percentages up.

If they are going to have layoffs by seniority the company will probably not have any chance of reaching where they were on July 27 before the five years are up.

Now, in order to accommodate both objectives EEOC may have to be happy with stabilizing for the time being at the July 27 levels, because once there are layoffs, even though the seniority clause

has to be adjusted to prevent deteriorating those percentages, the recalls come before new hires. You are not going to have any new hires until everybody who has been laid off has been recalled, assuming they want the jobs back, so what you are going to have is, if everybody is successful, and if nothing goes wrong, at best the leveling off of the affirmative action program for some period unknown at about the July 27 level, because there is no way to do hiring when you are laying off.

MR. COHEN: Do I also understand that the Court's jurisdiction insofar as rendereing this decision is not to be deemed its jurisdiction under Title Seven?

THE COURT: Its jurisdiction as I understand it is under the declaratory judgment act.

MR. COHEN: Well, affirmatively I wasn't sure whether your Honor was indicating that he was trying this as a matter—

THE COURT: I don't see basically that Title Seven is involved at all. Title Seven has provisions by statute of general application. Those provisions through the administrative arm that Cogress has created, namely, the EEOC, which has brought those general principles to detailed application in the case of this employer.

There is no need to look at the statute. You have got a contract. You have got two contracts, and the objective of one is in conflict with the objective of the other, and the conflict has not to be resolved. That is what declaratory judgment relief is about.

MS. JENKINS: Your Honor, do you intend to prepare a formal order in this matter?

THE COURT: Well, I normally look to counsel to do that.

Do you anticipate any difficulty? You are going to want a transcript, I assume, before you draw it.

MR. APRUZZESE: Yes, sir, as soon as possible.

I will endeavor to draw an order, and of course circulate it to my adversaries and see if we can all agree. If we don't agree I would solicit their earnest cooperation to get to the Court as quickly as possible—

THE COURT: Agreement only as to form.

MR. APRUZZESE: Yes, sir.

THE COURT: What time scale do you visualize?

MR. APRUZZESE: Just as soon as possible. We will start working on it anyway.

THE COURT: Is a week from tomorrow enough time to get a draft out?

MR. APRUZZESE: I would say so.

THE COURT: I am going to suggest a draft for everybody no later than next Friday, and anybody who has any objective to the draft should submit their version of the particular language directed to the Court with reasons within one week after receipt, and I will settle the form of the order. Otherwise we will spend longer settling the form of the order than the case would take to try.

MR. APRUZZESE: There is one other matter I would like to bring to the attention of the Court, and it is simply this, I realize there are no restraints in-

volved in this order. I also realize that the test of whether the company complies with the order would be a test that would be applied after the entire lay-off process is over, so that at any given point it might be that we might not be in strict conformity with the order, but that some point down the road we might get in conformity.

The point I want to raise, however, is that because of the nature of how difficult it is to follow the seniority process and the bumping process, and because of the added difficulty that will arise by trying to pass over, or, if you will, not lay off a given minority person, this will have an effect on the bumping process. It will be much different than we have already gone through for example, so that having gone through 176 employees, or having identified them through normal seniority, that whole picture is going to change now because within that 176 there are quite a few minority people, and if we decide that some of those should not be laid off then the 176 already identified might not be 176. It might be 100, because then we have to go through the whole process again.

The point I am trying to make is that this takes a tremendous amount of time.

Now, the company is in a posture—the best way I can describe it is to compare it to someone who is bleeding profusely, and they must apply a tourniquet, otherwise they are going to bleed to death, and if the company doesn't get some people off its payroll it's going to become financially insolvent.

Unfortunately, we do not have the luxury of time to go through these various processes and all that is required to identify the particular people and so on, and in certain respects I am fearful that it is almost going to take a looking back, if you will, because if we are to help the company in terms of its financial plight, we have to get some people out the door, and if we have to take all of these things into consideration it's going to be extremely difficult to make them all mesh in proper fashion so that the entire layoff is completed and we end in complete compliance with the current order.

What I am really saying is that it is going to be quite a juggling act, and it may be imperative for the company to get certain people off the payroll and to comply with the order it may be necessary—and I don't know, I am only speculating—and I hate to see this happen—have somebody off the payroll and call him back, but somebody has to go. Otherwise we won't have a layoff of 400. Then we're going to be talking of 800, and it is just a situation where we have to cut our losses, and that has been the difficulty with this situation since the beginning.

When we sat down and talked to any of the government agencies or submitted information to the Court, it was just impossible to come up with the names and faces as quickly as you would like, because the process doesn't lend itself to that type of a solution, and I know, because when the company told me this and the personnel people told me this and the lawyers in my office told me, I said, "Come on, don't

tell me it could be that hard, let's go up there and sit down," and now I believe it is that hard, so what I am really saying to the Court is that in order to get some people off the payroll and also to comply with the order and to give as much credence as we can to the collective bargaining agreement and as much credence as we can to the conciliation agreement, we really have our work cut out for us, and I just almost feel from the standpoint of where we are going to be when it is all over that some body is going to take a good shot at us and have a pretty good target, because it may very well prove to be a rather impossible task.

THE COURT: I would think that even though it may be complex, and even that it may take a little time, if you come out about where you are supposed to there should not be any question. You will be exposed to some risk of a kind which is probably worse than you were describing if you went through each program without this method, and you would have accomplished absolutely nothing if you were wrong, so the dilemma we hope will be minimized through the partial remedy given now.

MR. APRUZZESE: My whole point, your Honor, in making that statement, I was concerned because our vice president in charge of personnel said that, "Listen, we have to lay off some people," and my understanding of your Honor's order is you are going to stay the application of your order only pending the effort by Mr. Cohen to get a stay from the Third Circuit, or have them act on that.

THE COURT: There is no order signed yet, and there won't be one for perhaps ten days. No. I think it has to be two weeks. I am giving you to next Friday, and everybody else another week, so there is nothing to stay for two weeks, which means you have no remedy for two weeks.

MR. APRUZZESE: Right.

THE COURT: After that, if it takes a week to get a ruling from Philadelphia on a stay pending appeal, you are looking at three weeks, so you should know at the end of three weeks or so whether you have got a stay pending appeal.

MR. APRUZZESE: But in the meantime we are going to take action and lay off people and we will do so as best we can with a view towards what—

THE COURT: The important thing I think is that if we recognize that everybody who is a party to this suit, while he may have different views, certainly is not involved to the point of trying to make a difficult problem more difficult.

MR. APRUZZESE: Right.

THE COURT: I have seen nothing to suggest any lack of desire to reach a sound solution other than that which is natural from having different objects or different points of view, and the expectation is that this ruling as to the construction of the contract will provide a basis, whatever the views of any parties may have been, on which greater headway can be made than when you are still arguing what the contracts meant.

MR. COHEN: Do I understand that the company then should be going ahead in terms of layoffs?

THE COURT: I can't tell them whether to lay off or not.

MR. COHEN: I mean to continue.

THE COURT: That is what management is for.

MR. COHEN: And attempting also at the same time—attempting to comply with your Honor's view of the matter and—

THE COURT: I can't answer that. I can't say. What I told counsel for the company is there is no order signed yet. When there is one signed I take it you are going to and I will grant you a stay until you go to Philadelphia, so it won't be until Philadelphia tells you whether there is a stay pending appeal that you will know what rules you are working under.

That doesn't preclude your preparing on all sides. It will take this long to set up a system, won't it?

MR. COHEN: Unfortunately, I'm not sure—I agree with your Honor.

THE COURT: Yes.

I don't think anybody will be losing any unnecessary time.

MR. COHEN: Without any disrespect to your Honor, in terms of the decision, I do point out we had not argued the point as to the law governing the collective bargaining agreement. Had I known that was on your Honor's mind I would have pointed out that the law governing this collective bargaining agreement I believe is federal law, not state law. This is governed under 29 USC Section 185.

THE COURT: To the extent of that statute, but not for all aspects of contract law.

MR. COHEN: As a matter of fact all matters of contract law are governed under contracts between the labor organization and the employer engaged in interstate commerce, are governed under 29 USC Section 185. It's the federal common law Section 301 as it is commonly known.

THE COURT: On that matter there is no question but the Court has jurisdiction.

MR. COHEN: Oh, yes, yes.

THE COURT: Any other comment or suggestion?

(No response.)

THE COURT: All right.

A. 2.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MEMORANDUM, SEPTEMBER 23, 1974

Civil Action No. 74-1083

JERSEY CENTRAL POWER & LIGHT COMPANY,
a New Jersey Corporation, PLAINTIFF,

vs.

LOCAL UNIONS 327, ETC. ET ALS., DEFENDANTS.

MEMORANDUM

This memorandum supplements the oral opinion of September 5, 1974.

Territory Served.

This is larger than described at the hearing. It includes the area served by N. J. Power & Light Co., which merged into the employer on July 31, 1973. The added area includes the counties of Sussex, Warren and Hunterdon, the western part of Morris, and segments of Passaic, Mercer and Somerset. The new map submitted is marked Exh. J-1, and the added areas are the Northern and Western Divisions.

Financial situation; need for layoffs.

The annual reports, prospectuses and rulings of the state regulatory agency confirm the view ex-

pressed on September 5, 1974 that the adverse financial and economic trends developed in the Spring and Summer of 1974. No facts have been submitted by any party to suggest that the decision to effect layoffs was other than a good faith exercise of the judgment of management, faced with both those adverse trends and the effect of regulatory lag.

Extent of the ruling.

The ruling is a partial summary judgment, as appropriate under F.R.Civ.P. 56 (d). It does not terminate the action, F.R.Civ.P. 54 (b).

It deals only with the resolution of the conflicting provisions and objectives of the two separate agreements, both of which were adhered to by the employer and the Locals. The construction of these agreements avoids the frustration of the objectives of either the seniority clauses or of the affirmative action program, which would ensue if either were literally applied without regard to the other.

When the layoffs are completed, the ruling intends that minority employees and female employees are to constitute essentially the same proportion of the total work force as they did on July 27, 1974. A deviation which does not exceed 15% of those proportions, rounded out to the nearest whole individual (0.5 or more of an individual to be rounded up, and less than that rounded down), will not be considered significant. This requires the use of three seniority lists: one for minority employees, one for female employees, and one for "all other" employees. No

individual shall be counted more than once; i.e., an employee who is both minority and female shall be counted in the smaller, i.e., minority list, and not in the female list, for all calculations.

Status of GSA and OFCC.

These federal parties took the position that they had not taken any posture (either in this case or in any case) of the effect of layoffs on the applicability of Executive Order 11246, and did not know whether or not they would. Despite this, the remedy of declaratory judgment would be futile and frustrated unless these federal agencies were retained as parties and bound by the ruling, pursuant to F.R.Civ.P. 19 (a), and the disposition is intended to be binding on them.

This does not preclude either or both of them from taking a position on the question hereafter. If that should occur, it is to be prospective only, and if it differs from the ruling in this cause, its resolution will be dealt with in further proceedings here.

Stay pending appeal.

It was noted that the question would be certified for immediate appeal, in view of its novelty and importance. The request for stay pending appeal, however, raises more serious questions. If such a stay be granted, it is probable that the entire layoff process will have been completed under the seniority clause alone before the decision on appeal can be

expected. This would expose the employer to the risk of claims for back wages by minority and female employees for the period of the appeal, and thus frustrate the purpose of the remedy to that extent. Since the Locals seek the appeal, they ought to be committed to make the employer whole on back pay claims if a stay pending appeal is granted and if the appeal does not sustain the Local's position. Absent an appeal, the employer could properly adhere to the ruling here without that risk.

Since a stay pending appeal would have the effect indicated, this court feels it should not allow a stay for longer than needed to apply to the Court of Appeals for a stay pending appeal, and even that brief stay will be on the condition to indemnify and exonerate for the interim period if the Court of Appeals grants a stay on a like condition.

Union and Non-Union Employees.

The conflict between the collective bargaining agreement and the conciliation agreement which gives rise to the controversy obviously applies only to members of the Locals. The conciliation agreement applies to these employees and to probationary and non-union employees as well.

For this reason, the percentages to be adhered to in applying the order are those displayed for all employees, both as at July 27, 1974 and at completion of the layoffs. Those employees who are probationary, or who are not members of a local, are not

to be included in the three seniority lists and may be laid off or not without regard to seniority or seniority lists. They are to be included for the purpose of calculating their proportion, among all employees, at both the start and completion of the layoff process.

Since the layoff procedure is now under way and is not completed, the court does not at this stage include any ruling in regard to the future recall of employees laid off, whether or not they be members of the Local. That issue is not ripe for determination.

/s/ Vincent P. Biunno
VINCENT P. BIUNNO
U.S.D.J.

September 23, 1974

A. 3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ORDER GRANTING PARTIAL SUMMARY JUDGMENT,
SEPTEMBER 23, 1974

Civil Action No. 74-1083

JERSEY CENTRAL POWER & LIGHT COMPANY,
a New Jersey Corporation, PLAINTIFF,

vs.

LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 and 1314 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE UNITED STATES OFFICE OF FEDERAL CONTRACT COMPLIANCE, THE UNITED STATES GENERAL SERVICES ADMINISTRATION and THE NEW JERSEY DIVISION ON CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY, DEFENDANTS.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter having come on to be heard on September 5, 1974 on motion of plaintiff for summary judgment declaring the rights of the parties pursuant to Rule 56 of the Federal Rules of Civil Procedure and a crossmotion to dismiss the complaint having been made by the governmental defendants, General Services Administration and the Office of Federal Contract Compliance, Vincent J. Apruzzese,

Esquire of Apruzzese & McDermott appearing for plaintiff, and Edward A. Cohen of Franzblau, Cohen & Falkin, Attorneys appearing for defendant Local Unions 327, 749, 1289, 1298, 1303, 1309, 1314, International Brotherhood of Electrical Workers, and Terence G. Connor, Esquire, of the Department of Justice, appearing for defendants General Services Administration and Office of Federal Contract Compliance, and Issie L. Jenkins, Esquire, Associate General Counsel appearing for defendant Equal Employment Opportunity Commission, and no one having appeared on behalf of defendant the New Jersey Division On Civil Rights, Department of Law and Public Safety, and the court having considered the verified complaint, the answer of defendant Local Unions, affidavits, supplemental affidavits and briefs submitted, and having heard the argument of counsel and considered the conflicting positions advanced with regard to the proper layoff procedure to be followed by plaintiff in light of the seniority provisions of the collective bargaining agreement between plaintiff and defendant Unions and the provisions of the Conciliation Agreement effective December 3, 1973, as provided for in Sec. 706 Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 and it further appearing that there is no genuine issue in this case as to any material fact necessary to this partial summary judgment, and that plaintiff is entitled to a declaratory judgment as prayed for in the complaint as a matter of law, and the court having rendered an oral opinion on September 5, 1974 and consistent therewith

and other good cause appearing, it is on this 23rd day of September, 1974

ORDERED that the motion of defendants General Services Administration and Office of Federal Contract Compliance to dismiss the action is denied because the court finds them to be necessary parties under Rule 19(a)(1) Federal Rules of Civil Procedure provided that this order in no way restricts these defendants in pursuit of their obligations pursuant to Executive Order 11246, and it is further

ORDERED that plaintiff's motion for summary judgment be and it hereby is granted to the extent set forth herein; as a partial summary judgment and it is further

ORDERED, ADJUDGED AND DECREED that in the effectuation of a layoff, the provisions of the aforesaid collective bargaining agreement and the Conciliation Agreement should be so construed as to give maximum effect to the objectives of each, provided, however, that the seniority provisions of the collective bargaining agreement cannot be construed in such manner as to frustrate the affirmative action commitments contained in the Conciliation Agreement; and it is further

ORDERED, ADJUDGED AND DECREED that where and to the extent that the provisions of the collective bargaining agreement and the Conciliation Agreement are found to be inconsistent, the Conciliation Agreement is to prevail; and it is further

ORDERED, ADJUDGED AND DECREED that, pursuant to this partial summary judgment, which is not a final judgment, layoffs are to be accomplished in such manner that upon completion the process shall substantially preserve the minority and female ratios which existed on July 27, 1974; provided, however, that any necessary deviation from such ratios shall not exceed fifteen (15%) percent rounded to whole individuals; and it is further

ORDERED, ADJUDGED AND DECREED that the authority or jurisdiction of any defendant governmental department or agency is not otherwise limited by this Order; and it is further

ORDERED, ADJUDGED AND DECREED that the parties shall confer as necessary with regard to the method, schedules, formulas and procedures to be utilized in complianec with this order, and; any party may move to dissolve, enlarge, modify the provisions hereof or to seek the further guidance of the court upon 5 days notice served upon counsel for the other parties, and the court shall retain jurisdiction of this cause for such purpose or for such other purposes as may be necessary and proper; and it is further

ORDERED, ADJUDGED AND DECREED that the Oral Opinion of September 5, 1974, and the Memorandum of the Court, of even date herewith, supplementing the same, shall constitute the court's findings of fact and conclusions of law, and that the

argument of the parties on any appeal to the Court of Appeals shall be deemed to have been advanced to this Court at the hearing on the matter. To the extent that such arguments have been submitted on informal application for reconsideration, the application is denied; and it is further

ORDERED, ADJUDGED AND DECREED that as this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, and it further appearing that an immediate appeal may materially advance the ultimate termination of this litigation, pursuant to 28 U.S.C. 1292 (b), defendants shall have leave to file an expedited appeal to the United States Court of Appeals for the Third Circuit, and this Order shall be, and it hereby is, stayed pending a determination of said court as to whether the stay shall be continued until its decision on the merits is rendered.

The stay so granted by this court is on the condition that the party or parties seeking the stay shall be obliged to indemnify and exonerate the plaintiff of and from any and all claims for reinstatement and back-pay made by any employee laid off during the effectiveness of the stay who is found to have been improperly laid off at the final determination of the appeal.

Done at Newark, New Jersey, this 23rd day of September 1974.

/s/ Vincent P. Biunno
VINCENT P. BIUNNO
U.S.D.J.

B. 1.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDER ON PETITION FOR REHEARING, MARCH 4, 1975

No. 74-2016

JERSEY CENTRAL POWER & LIGHT CO., APPELLEE,

v.

LOCAL UNIONS 327, ET AL.

LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309, and 1314 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, APPELLANTS.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by The United States Equal Employment Opportunity Commission, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for re-

hearing is denied. Judge Gibbons would grant rehearing by the court in banc.

By the Court,

/s/ [Illegible]
Judge

Dated: Mar. 4, 1975

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